89-647

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF IDAHO FALLS, IDAHO,
Petitioner,

v.

PROJECT 80's, INC. and
DAVID JOHN FITZEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Ninth Circuit err in invalidating a municipal ordinance prohibiting uninvited door-to-door sales at the homes of its residents on the grounds that the ordinance is not the least restrictive means of achieving the petitioner's legitimate interest in protecting the privacy of the homes of its citizens?

PARTIES TO THE PROCEEDING BEFORE THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Appellants:

Project 80's, an Idaho Corporation

David John Fitzen, an individual residing in Bannock County, Idaho

Appellees:

City of Pocatello, Idaho, a municipal corporation of the State of Idaho

The City of Idaho Falls, Idaho, a municipal corporation of the State of Idaho

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---

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The judgment for which review is sought is the Order and Amended Opinion of the Court of Appeals for the Ninth Circuit in *Project 80's, Inc. v. City of Pocatello*, No. 86-4348, slip op. (9th Cir. May 25, 1989). The Order and Amended Opinion were entered on May 25, 1989. The case was argued and submitted to the Ninth Circuit Court of Appeals on August 4, 1987. The Ninth Circuit entered its original opinion on September 15, 1988. *Pro-*

ject 80's, Inc. v. City of Pocatello, No. 86-4348, slip op. (9th Cir. September 15, 1988). The City of Pocatello timely filed a petition for rehearing and suggestion for rehearing en banc. The Ninth Circuit rejected the City of Pocatello's petition for rehearing and suggestion for rehearing en banc by its order of May 25, 1989. By that same Order, the Ninth Circuit also amended its original Opinion of September 15, 1988, distinguishing this case from *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

CONSTITUTIONAL PROVISIONS:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
>
> U.S. Const. amend. I.

ORDINANCES:

> UNINVITED PEDDLERS PROHIBITED: The practice of going in and upon private residences in the Municipality by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise, not having been requested or invited to do so by the owner or occupant of said private premises, for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is hereby prohibited and punishable under the provisions of this Code.
>
> City of Idaho Falls, Id., Code § 5-4-1 (1962).

> Uninvited Peddlers Declared Nuisance.
>
> A. The practice of going in and upon private residences in the municipality by solicitors, peddlers, hawkers, itin-

> erant merchants or transient vendors of merchandise not having been requested or invited to do so by the owner or owners, occupant, or occupants of the private residence is declared to be a nuisance and punishable as such nuisance as a misdemeanor.
>
> B. Acts prohibited under this section include solicitation of orders for the sale of, or payment for, any goods, wares, merchandise, services, employment or contracting for any of the aforementioned. Requests for goods, gifts, donations or services by the solicitor, sales person or vendor from the resident is also declared a nuisance; provided, however, persons who solicit donations for charitable or nonprofit organizations shall not be deemed to be in violation of this chapter.
>
> City of Pocatello, Id., Ordinance No. 9.24.010.

STATEMENT OF THE CASE

1. *Statement of Facts.*

In 1950, petitioner, the City of Idaho Falls, Idaho ("Idaho Falls") enacted an ordinance prohibiting uninvited or unrequested persons from going door-to-door at the private residences within Idaho Falls for the purpose of selling or taking orders for the sale of goods, wares and merchandise. City of Idaho Falls, Id., Code § 5-4-1 (1962). The City of Pocatello, Idaho ("Pocatello") has a similar ordinance, although Pocatello's ordinance explicitly excepts uninvited door-to-door solicitation of donations for charitable or nonprofit organizations. City of Pocatello, Id., Ordinance No. 9.24.010B. Ordinances of this type are typically referred to as "Green River" ordinances after the case of *Green River v. Fuller Brush*, 65 F.2d 112 (10th Cir. 1933). *See also Breard v. City of Alexandria*, 341 U.S. 622, 627-28, 71 S. Ct. 920, 95 L. Ed. 1233, 1240 (1951).

The facts concerning respondents Project 80's, Inc. ("Project 80's") and David John Fitzen ("Fitzen") are set forth in the Amended Opinion of the Court of Appeals for the Ninth Circuit. *Project 80's, Inc. v. City of Pocatello*, No. 86-4348, slip op. at 5587 (9th

Cir. May 25, 1989). They need only be summarized here.

Project 80's is an Idaho corporation that provides work programs for teenage youths. At the time this case was initiated, Fitzen worked for Project 80's, coordinating solicitation and sales in Pocatello and Idaho Falls. Fitzen's sales force sold various confectionaries and other items door-to-door. In 1984, Project 80's attempted to obtain licenses from Pocatello and Idaho Falls to conduct door-to-door sales. Although both cities denied the licenses, Project 80's sent its staff into both cities and conducted door-to-door sales. On February 4, 1986, the Pocatello Police Department issued citations against two minors employed by Project 80's for violation of the Pocatello ordinance and also cited Fitzen for encouraging the delinquency of a minor. In March 1986, the Idaho Falls Police Department cited Fitzen for violating its "Green River" Ordinance.

2. ***Jurisdiction in the District Court.***

Project 80's and Fitzen filed their complaint against Idaho Falls and Pocatello challenging the constitutionality of the cities' two ordinances and seeking declaratory and injunctive relief against their enforcement. *Project 80's, Inc. v. City of Pocatello,* No. 86-4348, slip op. 5587-88 (9th Cir. May 25, 1989). The complaint was filed in the United States District Court for the District of Idaho. Jurisdiction of the district court was based on 28 U.S.C. §§ 1331(a) and 2201.

3. ***Proceedings Below.***

Pocatello filed a motion to dismiss Project 80's and Fitzen's complaint, and Idaho Falls filed a motion for summary judgment. Because Pocatello's motion was supported by matters outside the pleadings, the district court treated its motion as a motion for summary judgment. *Project 80's, Inc. v. City of Pocatello,* No. 86-4348, Memorandum Decision, at 1 n.1 (D. Id. October 16, 1986) (included in the Appendix to this Petition). The district court concluded that the ordinances did not violate Project 80's or Fitzen's First Amendment right of commercial speech and granted summary judgment in favor of Idaho Falls and Pocatello. *Id.*, at 10. *See also* Appendix, at A-11. In determining that the ordinances were valid, the district court applied the test set out by this Court in *Metrome-*

dia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). This test is identical to the test this Court prescribed for regulation of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra.* The district court found that the ordinances satisfied all the requirements of these tests. With respect to the fourth prong of the *Central Hudson* test, the court found that the ordinances' total prohibition on door-to-door commercial solicitations was the only satisfactory means of protecting homeowners' privacy. *Id.*, at A-7, A-8.

Project 80's and Fitzen appealed the decision of the district court to the Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the summary judgments in favor of Idaho Falls and Pocatello and remanded the case to the district court for further proceedings consistent with its opinion. *Project 80's, Inc. v. City of Pocatello,* No. 86-4348, slip op. at 5599 (9th Cir. May 25, 1989). In reviewing the validity of the Idaho Falls and Pocatello ordinances, the Ninth Circuit adopted the *Central Hudson* test. The Ninth Circuit found that all of the requirements of that test were met except the fourth prong. According to the Ninth Circuit, the Idaho Falls and Pocatello ordinances were constitutionally invalid because they are not the least restrictive means available to the cities to protect the privacy of homeowners. *Id.*, at 5592-94.

ARGUMENT

As noted above, in invalidating the Idaho Falls' "Green River" ordinance, the Ninth Circuit adopted the *Central Hudson* test. *Id.*, at 5589. This Court has stated that test in the following way:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation

> directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. & Electric Corp. v. Public Service Commission of New York, supra, 447 U.S. at 566, 65 L.Ed.2d at 351.

The Ninth Circuit had no difficulty in finding that the first three parts of the *Central Hudson* test were met. The Court noted that Project 80's' door-to-door solicitation activities included a sufficient element of commercial speech to qualify for protection under the first prong of the test. *Project 80's, Inc. v. City of Pocatello,* No. 86-4348, slip. op. at 5591. The Court of Appeals also easily found that Idaho Falls' interest in protecting the privacy and repose of its citizens in their homes is a substantial state interest. *Id.* Moreover, the Ninth Circuit found that the Idaho Falls' "Green River" ordinance directly advanced the city's interest in protecting the privacy of the homes of its residents. *Id.*, at 5592.

However, while the Ninth Circuit recognized that the Third Circuit had held that *Central Hudson* does not require the least restrictive means, it read the fourth prong of the *Central Hudson* test to require that the Idaho Falls' ordinance be the least restrictive means of advancing its interest in protecting the privacy of the homes of its residents. *Id.*, at 5592 n. 4. *See also American Future Systems v. Pennsylvania State University,* 752 F.2d 854, 865 (3rd Cir. 1984). As the Ninth Circuit stated:

> Like the Second Circuit, *Fox v. Board of Trustees,* 841 F.2d 1207 (1988), *petition for cert. filed,* we view the fourth prong of the *Central Hudson* test as embodying a requirement of the "least restrictive alternative."

Project 80's, Inc. v. City of Pocatello, No. 86-4348, slip op. at 5592 n. 4. The Court of Appeals went on to state:

> It is here that Project 80's' argument is at its strongest. To protect privacy, there is clearly a less restrictive alternative available to the cities.

Id., at 5592 Consequently, the Ninth Circuit held that that Idaho Falls' "Green River" ordinance failed to satisfy the fourth prong of

the *Central Hudson* test and was therefore constitutionally invalid. *Id.*, at 5592, 5594.

Subsequent to the Ninth Circuit's Amended Opinion in *Project 80's, Inc. v. City of Pocatello,* this Court decided *Board of Trustees of the State University of New York v. Fox,* 57 U.S.L.W. 5015 (U.S. June 29, 1989). The sole question in *Fox* was "whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end." *Id.*, at 5016. Thus, the primary concern of the Court in *Fox, supra,* was to interpret the fourth prong of the *Central Hudson* test. The Court specifically held that the fourth prong of the *Central Hudson* test does not require applying the least-restrictive-means standard:

> [W]e now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.

Id., at 5017. Rather, the Court stated that the fourth prong of the *Central Hudson* test requires only that governmental regulation of commercial speech be "narrowly tailored to achieve the desired objective." *Id.*, at 5018. To be "narrowly tailored" all that is necessary is that there be a reasonable fit between the regulation and the end served and that the scope of the regulation be proportional to the interest served. As the Court stated:

> Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.

Id.

In explaining its interpretation of the fourth prong of the *Central Hudson* test, the Court noted its continual emphasis on the limited measure of protection and the subordinate position of commercial speech under the First Amendment. *Id.*, at 5017, 5018. The Court compared the test for the validity of regulations of commercial speech with the tests used to assess the validity of time, place and manner restrictions of political speech and governmental regulation of expressive conduct. *Id.* In the latter two instances, the Court noted that governmental regulations must be "narrowly

tailored" to serve significant governmental interests, but this did not imply a least-restrictive-means. The Court went on to state:

> While these two lines of authority do not of course govern here, we think it would be incompatible with the asserted "subordinate position [of commercial speech in the scale of First Amendment values] to apply a more rigid standard . . ..

Id. The Court also noted that its decisions upholding regulations of commercial speech could not be reconciled with a least-restrictive-means test. *Id.* The Court recognized the importance of maintaining a distinction between commercial and noncommercial speech, a distinction that would be lost if regulation of commercial speech had to meet a least-restrictive-means requirement:

> "To require parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech."

Id., quoting Ohralick v. Ohio State Bar Association, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L.Ed. 444 (1978).

The instant case invites revisiting the decision of this Court in *Breard v. City of Alexandria, supra,* In *Breard, supra,* a "Green River" ordinance banning door-to-door solicitations for the sale of magazines was challenged on First Amendment grounds. This Court upheld the ordinance, finding that it did not unconstitutionally abridge the freedom of speech and press guaranteed under the First Amendment. *Breard v. City of Alexandria, supra,* 342 U.S. at 641-42, 95 L.Ed.2d at 1247-48. Although *Breard* was decided before commercial speech was accorded any protection under the First Amendment, it has never been overturned and remains good law. The *Beard* court had noted the increasing use of door-to-door solicitation to sell goods and also the widespread use of "Green River" ordinances to prohibit such activities. *Id.,* 341 U.S. at 626, 628 n. 6, 95 L.Ed.2d 1239, 1240 n. 6. Many cities and counties continue to use "Green River" ordinances to regulate door-to-door solicitation to protect the privacy of the homes of their citizens.

Thus, the issue raised in the instant case has widespread significance.

The Court's interpretation of the fourth prong of the *Central Hudson* test in *Fox, supra,* clearly conflicts with the Ninth Circuit's invalidation of the Idaho Falls' "Green River" ordinance on the grounds that it fails to meet a least-restrictive-means test. Idaho Falls thus respectfully submits that the Ninth Circuit erred in applying a least-restrictive-means test to its ordinance and requests this Court to grant its Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 23rd day of August, 1989.

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AFFIDAVIT OF SERVICE

Dale W. Storer, being first duly sworn upon oath, deposes and says:

Pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of petitioner's Petition for Writ of Certiorari and accompanying Appendix on each party required to be served, including the following:

F. Michael Burkett, Jr.
Statehouse Center Building
775 North 8th St., Suite 200
P.O. Box 2898
Boise, Idaho 83701
Counsel for Respondents Project 80's, Inc. and
David John Fitzen

Ms. Nancy Ferris
Chief Deputy City Attorney
City of Pocatello
P.O. Box 5169
Pocatello, Idaho 83205

by depositing the same in the United States mail, first class mail, postage prepaid, on August 23, 1989.

Dated this 23rd day of August, 1989

Dale W. Storer

SUBSCRIBED AND SWORN to before me this 23rd day of August, 1989.

Joseph Charles Burgess
Notary Public for Idaho
Residing in Idaho Falls, ID
Commission expires 9/6/94

188.7/JCBP

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

PROJECT 80's INC., AND DAVID JOHN FITZEN,

Plaintiffs,

-vs-

CITY OF POCATELLO AND THE CITY OF IDAHO FALLS, IDAHO,

Defendants.

Civil No. 86-4128

MEMORANDUM DECISION

The Court has before it the defendants' motions for summary judgment[1] and the plaintiffs' motion for preliminary injunction. The Court will turn first to the motions for summary judgment.

---

[1] Defendant City of Pocatello filed a motion to dismiss but the Court has examined material outside the pleadings and hence treated the motion as a motion for summary judgment. See Fed.R.Civ.P. 12(b)

The plaintiffs challenge the constitutionality of ordinances passed by two Idaho cities prohibiting door-to-door sales and solicitations. The two ordinances at issue are almost identical.

The Idaho Falls ordinance provides as follows:

> UNINVITED PEDDLERS PROHIBITED: The practice of going in and upon private residences in the Municipality by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise, not having been requested or invited so to do by the owner or occupant of said private premises, for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is hereby prohibited and punishable under the provisions of this Code.

The Pocatello ordinance provides as follows:

> A. The practice of going in and upon private residences in the municipality by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of

> merchandise not having been requested or invited to do so by the owner or owners, occupant or occupants of the private residences is declared to be a nuisance and punishable as such nuisance as a misdemeanor.
>
> B. Acts prohibited under this section include solicitation of orders for the sale of, or payment for, any goods, wares, merchandise, services, employment or contracting for any of the aforementioned. Requests for goods, gifts, donations or services by the solicitor, salesperson or vendor from the resident is also declared a nuisance; provided, however, persons who solicit donations for charitable or nonprofit organizations shall not be deemed to be in violation of this chapter.

The plaintiffs are Project 80's Inc. and David Fitzen. Project 80's Inc. is an Idaho corporation providing work programs for teenage children. The teenagers, all under the age of eighteen, make up the corporation's sales staff and sell various confectionaries door-to-door. They visit private residential neighborhoods and make house calls uninvited. Plaintiff David Fitzen

manages the Project 80's operation in Eastern Idaho.

In 1984, Project 80's Inc. requested license applications from both Pocatello and Idaho Falls to conduct door-to-door sales. The application requests were denied. Project 80's nevertheless sent its staff into Pocatello and Idaho Falls and conducted door-to-door sales. On February 4, 1986, the Pocatello Police Department issued citations against two minors employed by Project 80's, citing them for violation of the Pocatello ordinance cited previously. In addition, the Pocatello police also cited plaintiff Fitzen for encouraging the delinquency of a minor. In March 1986, the Idaho Falls Police Department, responding to a complaint, cited Fitzen for violation of the Idaho Falls ordinance.

The plaintiffs responded by bringing this action challenging the constitution-

ality of the ordinances and seeking declaratory and injunction relief preventing their enforcement. Plaintiffs' complaint alleges that the ordinances violate the First, Fifth and Fourteenth Amendments. The Court will turn first to plaintiffs' First Amendment challenge.

Plaintiffs argue that although door-to-door solicitations may be regulated, the First Amendment does not abide an ordinance that completely bans such commercial speech. This argument would have been easily rejected ten years ago. At that time, the leading authority in this area was Beard v. City of Alexandria, 341 U.S. 622 (1951), where the United States Supreme Court upheld an ordinance almost identical to the ordinances challenged here. In Beard, the Supreme Court characterized the banned solicitations as commercial

speech, and held that the homeowner's privacy interest outweighed whatever slight protection was accorded to commercial speech.

Commercial speech has, however, enjoyed somewhat of a renaissance since Beard. In 1976, the United States Supreme Court discussed the increased protection afforded to commercial speech in a case challenging a Virginia statute prohibiting pharmacists from advertising in any manner. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Pharmacists who did advertise were subject to sanctions from the State Board of Pharmacy (Board). A citizens' group attacked the statute as violative of the First Amendment, and the Board defended. The Board pressed upon the Court the argument that commercial speech enjoyed no First Amendment protection. The Court

rejected this argument, and held that a statute that singles out speech of a particular content--in this case pharmaceutical prices--and prevents its dissemination completely, violates the first amendment. The Court did note, however, that under other circumstances a state could regular [sic] and prohibit commercial speech. Those circumstances were set forth in a four-part test in Central Hudson v. Public Service Commission, 447 U.S. 577 (1980):

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it, (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Id. at 560. That test is still valid today. See Posades De Puerto Rico Association v. Tourism Company of Puerto Rico, 54 U.S.L.W. 4956 (1986).

The United States Supreme Court case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra, gives a good example of how the high court applies the four-part test. In that case, a Virginia statute singled out and prohibited all advertising of drug prices. Under that statute, Virginia pharmacists were not only prevented from advertising or selling door-to-door, but also could not use the print or electronic media to advertise and were presumably exposed to prosecution even for starting word-of-mouth advertising. This Virginia statute was infirm for two main reasons. First, the statute did regulate speech based on its content--only pharmaceutical advertising was singled out and prohibited by the statute. Secondly, there were no alternative channels for communication

open--all pharmacists were prohibited from advertising in any form.

In contrast, the ordinances in the present case are content neutral and leave open many avenues of communication. In fact, the ordinances in this case fit very comfortably within the four-part test enunciated in Central Hudson.

First, it is clear that the conduct and commercial speech proscribed by the ordinances concerns lawful activity and is not necessarily misleading. Secondly, the ordinances do serve a substantial governmental interest. In Hynes v. Mayor of Oradell, 425 U.S. 610, 618-619 (1976), the Supreme Court repeated the important interests that these ordinances serve:

> Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance including intrusion upon the hours of rest and the prevention of

> crime. Constant callers whether selling pots or distributing leaflets may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or a railroad yard which zoning ordinances may prohibit.

The same idea was put even more succinctly by Professor Zechariah Chafee in his book, Free Speech in the United States, quoted with approval in Hynes:

> Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.

Id. at 619.

The final two requirements are that the ordinances directly advance the privacy interests of the homeowner and reach no further than necessary to accomplish that goal. It is a pure matter of common sense that a statute prohibiting door-to-door solicitation directly provides privacy to the homeowner. The plaintiffs argue, however, that the ordinances stretch

further than necessary. The plaintiffs suggest that the privacy interest of the homeowners could be equally served if homeowners simply put out signs warning solicitors not to trespass, or if the cities adopted a permit system rather than a total ban.

While a permit system might winnow out the more obvious criminal solicitors, it would do nothing to protect privacy--soliciting would occur at much the same frequency as if no ordinance existed. The alternative of a sign on the homeowners' property, acting like a scarecrow to shoo away solicitors, was rejected by the United States Supreme Court in Beard v. City of Alexandria, supra:

> A householder depends for protection on his city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors. A sign would have to be a small billboard to make the differentiations between the welcome

> and unwelcome that can be written in an ordinance once cheaply for all homes.

Id. at 640.

In fact, no alternative can satisfactorily protect the homeowner's privacy as the total prohibition imposed by these ordinances. This was the same conclusion reached in May v. People, 636 P.2d 672 (Colo.S.Ct. 1981). There, the court was faced with ordinances essentially identical to the ordinances here, and stated:

> Although the municipality's concern with public safety could be promoted by a permit system, . . . the individual's interest in maintaining the privacy and solitude of his home is most directly and most effectively advanced by a total ban on door-to-door commercial solicitation.

Id. at p. 680.

In essence, this case is similar to Metro Media, Inc. v. City of San Diego, 453 U.S. 490 (1981). There, the United States Supreme Court approved a city's

total ban on all off-site commercial billboards. The city had found that the billboards were unattractive and a traffic hazard. The plaintiffs had urged that measures other than a total prohibition would be less onerous. The Court held:

> If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.

Id. at 508.

The same is true in the present case. The substantial interest in protecting homeowners' privacy can only be fully protected by a total ban on door-to-door commercial solicitations.

Thus, the test established in the Central Hudson case is satisfied. The plaintiffs argue, nevertheless, that the ordinances are unconstitutionally overbroad. Although plaintiffs concede

that the ordinances, as applied to plaintiffs, only prohibit commercial speech, plaintiffs argue hypothetically that the ordinance could also ban non-commercial door-to-door solicitation. The United States Supreme Court has allowed a litigant with a commercial interest in speech to challenge the facial validity of an ordinance on grounds that it may infringe the protected noncommercial speech of others. See Metro Media Inc. v. City of San Diego, supra. But where the ordinance proscribes conduct along with speech--as here--the overbreadth of the statute must be real and substantial. See Broadrick v. Oklahoma, 413 U.S. 601 (1973). There is no real and substantial overbreadth in the present case. The clear language of the ordinances applies proscriptions only to commercial speech--the "sale of goods, ware and

merchandise." Whatever slight overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may be applied. See Broadrick v. Oklahoma, supra.

The plaintiffs next contend that the ordinances deprive them of property without due process. This argument has been rejected by the United States Supreme Court. See Beard v. City of Alexandria, supra.

Finally, plaintiffs claim that they are denied equal protection because some groups are allowed to solicit while others are not. The testimony at the evidentiary hearing, and the affidavits of McCoy and Propst establish that both the Pocatello and Idaho Falls Police Departments do not enforce the ordinances unless they receive complaints from homeowners. If some soliciting groups do

not elicit complaints, there is no prosecution. Thus, some groups may indeed solicit without citation not because of any favored treatment, but rather because no complaints are received by the police. The fact that some groups escape prosecution is not a denial of equal protection unless selective enforcement of the statute is intentional. See May v. People, supra.

Finally, the plaintiffs have filed a motion for a continuance seeking more discovery. Under Fed.R.Civ.P. 56(f), a party must present by affidavits the reasons offered in support of the motion for a continuance and the need for more discovery. In this case, the plaintiffs have had nearly two months in which to pursue discovery since the cities' summary judgments were filed, and in fact the motions do not raise any new issues

that were not already raised in plaintiffs' complaint. The plaintiffs have had nearly four months from the filing of the complaint to pursue discovery. Plaintiffs offer no reason for the alleged inability to complete discovery. There is no indication as to why discovery could not have occurred during the four-month period after the complaint was filed. For these reasons, the Court will deny the motion for continuance.

Under all these circumstances, the Court finds that the defendants' motions for summary judgment are well taken. In light of these findings, the Court will deny the plaintiffs' motion for preliminary injunction. The Court will grant the defendants' motions for summary judgment.

DATED this 16th day of October, 1986.

/s/ Marion J. Callister
Marion J. Callister,
Chief Judge
United States District
Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

PROJECT 80's INC., AND DAVID JOHN FITZEN,

Plaintiffs,

-vs-

CITY OF POCATELLO AND THE CITY OF IDAHO FALLS, IDAHO,

Defendants.

Civil No. 86-4128

JUDGMENT

The Court has before it motions for summary judgment filed by the defendants, a motion for preliminary injunction filed by the plaintiff, and a motion for a continuance seeking more discovery. In accordance with the views expressed in the memorandum decision accompanying this judgment,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motions for summary judgment filed by the

defendants be, and the same are hereby, GRANTED, the Court finding no genuine issues of material fact.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion for preliminary injunction filed by plaintiffs be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion for a continuance filed by the plaintiffs be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiffs for costs incurred herein to be determined by the Clerk of Court after proper submission of cost bills.

DATED this 16th day of October, 1986.

/s/ Marion J. Callister
Marion J. Callister,
Chief Judge
United States District
Court

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PROJECT 80's, INC. AND DAVID JOHN FITZEN,
Plaintiffs-Appellants,
v.
CITY OF POCATELLO and THE CITY OF IDAHO FALLS, IDAHO,
Defendants-Appellees.

No. 86-4348
D.C. No. CV-86-4128 MJC
OPINION

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, Chief Judge, Presiding

Argued and Submitted
August 4, 1987—Seattle, Washington

Filed September 15, 1988

Before: William C. Canby, Jr., Stephen Reinhardt and Robert R. Beezer, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Constitutional Law

The court reversed a summary judgment, holding that two ordinances were unconstitutional.

The cities of Idaho Falls and Pocatello had two ordinances almost identical banning uninvited residential door-to-door

solicitation. Appellant Project 80's, Inc. hires teenagers to sell various confectionaries door-to-door. Pocatello and Idaho Falls police issued citations against two soliciting minors employed by Project 80's for violation of the anti-solicitation ordinances. After Project 80's brought an action challenging the constitutionality of the two ordinances, the district court granted summary judgment for the cities/defendants.

[1] In evaluating the four-prong test for commercial speech, the court concluded that door-to-door solicitation by Project 80's included a sufficient element of commercial speech to qualify under the first prong. [2] Under the second prong, the court had little difficulty in accepting privacy, prevention of crime, and consumer protection as substantial state interests. [3] In determining the third prong, whether the governmental interests are directly advanced by the regulation, the court decided that the privacy interest and perhaps, marginally, the crime-prevention interest, satisfied the cities' requirements. [4] However, the cities fail the fourth prong, by sweeping far more broadly than necessary to protect privacy. [5] The court also agreed with the Seventh Circuit that policy Supreme Court case precedent support the imposition of a least restrictive means requirement. [6] Thus, for the same reasons the court found these ordinances deficient under the fourth prong, they fail as appropriate time, place, and manner restrictions.

COUNSEL

F. Michael Burkett, Boise, Idaho, for the plaintiffs/appellants.

Nancy A. Ferris, Pocatello, Idaho, for the defendant/appellee City of Pocatello and Joseph C. Burgess, Idaho Falls, Idaho, for the defendant/appellee City of Idaho Falls.

OPINION

CANBY, Circuit Judge:

This action challenges the constitutionality of two ordinances that ban uninvited residential door-to-door solicitation. The district court concluded that the ordinances did not violate appellants' First Amendment right of commercial speech, and it accordingly granted summary judgment for the defendants. We reverse.

FACTS

The two ordinances are almost identical. The Idaho Falls ordinance provides:

> UNINVITED PEDDLERS PROHIBITED: The practice of going in and upon private residences in the Municipality by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise, not having been requested or invited to do so by the owner or occupant of said private premises, for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is hereby prohibited and punishable under the provisions of this Code.

Idaho Falls City Code § 5-4-1. The Pocatello ordinance[1] is to

[1]Pocatello City Ordinance No. 9.24.010 provides:

> Uninvited peddlers declared nuisance.
>
> A. The practice of going in and upon private residences in the municipality by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited to do so by the owner or owners, occupant, or occupants of the private residences is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

the same effect, except that it contains a proviso that "persons who solicit donations for charitable or nonprofit organizations shall not be deemed to be in violation" of the ordinance.

Plaintiffs are Project 80's, Inc., and David Fitzen.[2] Project 80's is an Idaho corporation providing work programs for teen-age youths. David Fitzen, who began working for Project 80's as a teen-ager, now coordinates solicitation and sales in an area that includes Pocatello and Idaho Falls. His sales force, all under the age of eighteen, sell various confectionaries door-to-door. They normally sell between the hours of 4:00 and 8:30 p.m. on weekdays and all day on Saturdays. In 1984, Project 80's sought licenses from both Pocatello and Idaho Falls to conduct door-to-door sales. The licenses were denied. Project 80's nevertheless sent its staff into both cities and conducted door-to-door sales. On February 4, 1986, the Pocatello Police Department issued citations against two minors employed by Project 80's for violation of the Pocatello anti-solicitation ordinance. The Pocatello police also cited Fitzen for encouraging the delinquency of a minor. In March 1986, the Idaho Falls Police Department, responding to a complaint, cited Fitzen for violation of the Idaho Falls ordinance.

Project 80's subsequently brought this action challenging the constitutionality of the two ordinances and seeking

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B. Acts prohibited under this section include solicitation of orders for the sale of, or payment for, any goods, wares, merchandise, services, employment or contracting for any of the aforementioned. Requests for goods, gifts, donations or services by the solicitor, salesperson or vendor from the resident is also declared a nuisance; provided, however, persons who solicit donations for charitable or nonprofit organizations shall not be deemed to be in violation of this chapter.

[2]Unless otherwise indicated, references to "Project 80's" in this opinion include Fitzen.

declaratory and injunctive relief against their enforcement.[3] The district court granted summary judgment for the defendants.

DISCUSSION

Project 80's claim lies rather neatly at the intersection of two developing lines of First Amendment law. One has to do with the evolving standards for protection of commercial speech; the other with the permissible extent of time, place, and manner restrictions on door-to-door solicitation. We will discuss each in turn.

Commercial speech

In *Breard v. Alexandria,* 341 U.S. 622 (1951), the Supreme Court upheld an ordinance against door-to-door solicitation, and observed that a First Amendment challenge to such an ordinance was "not open to the solicitors for gadgets or brushes." *Id.* at 641. *Breard,* however, was decided at a time when commercial advertising was thought to be wholly unprotected by the First Amendment. *See Valentine v. Chrestensen,* 316 U.S. 52 (1942).

Subsequently, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), the Supreme Court held that the First Amendment protected purely commercial advertisements of prescription drug prices. The information conveyed by such advertising was viewed as highly important and beneficial to the consumer and to society. *Id.* at 763-65. Commercial advertising has

[3]The record before us does not disclose what final disposition was made of the citations issued by the two cities. We do not read Project 80's' complaint as seeking relief from those citations; it prays for relief against "further" enforcement. Accordingly, abstention under *Younger v. Harris,* 401 U.S. 37 (1971), is not an issue. *Wooley v. Maynard,* 430 U.S. 705 (1977). Neither city has suggested abstention in the district court or this court.

since been protected in a number of contexts. *E.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988). Despite the value and importance of commercial speech, it was understood from the beginning that it was entitled to a lower degree of First Amendment protection than noncommercial speech. Commercial speech, for example, could be prohibited if it was misleading or deceptive, *see Virginia Board of Pharmacy*, 425 U.S. at 771-72, or if it advertised a transaction or activity that was itself illegal, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Whether further regulation was permitted was not clear at first, but the Supreme Court later announced a standard in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). In striking down a state prohibition on the advertising of electric power, the Court adopted a four-part test for regulation of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The parties disagree on whether the application of this test must result in the invalidation of the Idaho Falls and Pocatello ordinances. They further disagree on the question whether this *Central Hudson* standard itself applies with full force to ordinances prohibiting door-to-door solicitation — an area normally governed by a somewhat divergent test for

time, place and manner regulation of noncommercial speech. We address these questions in order.

The first issue under the four-prong *Central Hudson* analysis is whether Project 80's sales activities constitute expression protected by the First Amendment. There is no dispute that the sale of candies and similar items is generally lawful, and there is no claim that Project 80's' sales pitch is misleading or deceptive. Pocatello suggests, however, that the activity of Project 80's in consummating sales door-to-door is primarily conduct, and that the speech element is so subordinated that the First Amendment may not be implicated at all. Pocatello points out that most of the decisions protecting commercial speech, like *Virginia Board of Pharmacy*, involve advertising, not actual sales. The ordinances in question here do not forbid Project 80's from leaving printed advertisements on the homeowner's doorstep; they merely prohibit in-person solicitation. Pocatello relies upon *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), in which the Supreme Court upheld a prohibition of in-person solicitation of clients by lawyers, stating that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." *Id.* at 459.

[1] Pocatello's argument goes too far, however, in suggesting that the sales activities of Project 80's do not implicate the First Amendment at all. The decision in *Ohralik* was primarily based on the potential for overreaching by an attorney who importunes a potential client, not on the fact that solicitation was devoid of information. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985). There can be little question that the door-to-door sales of Project 80's involve a considerable degree of commercial communication by the sales force. As the Supreme Court noted in a case involving noncommerical door-to-door fundraising, "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes. . . ." *Village of Schaumburg v. Citizens for a Better Environment*,

444 U.S. 620, 632 (1980); *see Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-18 (1976). We conclude, therefore, that the door-to-door solicitation of Project 80's includes a sufficient element of commercial speech to qualify under the first prong of the *Central Hudson* standard. The speech component of that solicitation does not disappear merely because it is connected with a sale or attempted sale. Nor does it vanish simply because an alternative of printed communication may exist. Alternatives may enter the analysis under other prongs of the *Central Hudson* analysis, *see, e.g., American Future Systems v. Penn. State University*, 752 F.2d 854, 866 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985), but they do not remove in-person solicitation from the First Amendment altogether.

[2] The next issue under *Central Hudson* is whether the governmental interest is substantial. Idaho Falls asserts a governmental interest in protecting the privacy and repose of its citizens in their homes. To this Pocatello adds the interests of consumer protection, regulation of commercial transactions, and prevention of crime. "Regulation of commercial transactions" is more of a practice than an interest; we would have to be told the purpose of the regulation to determine whether an important governmental interest was involved. We have little difficulty, however, in accepting privacy, prevention of crime, and consumer protection as substantial state interests. *See Frisby v. Schultz*, 56 U.S.L.W. __, __ (U.S. June 27, 1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980).

[3] The third *Central Hudson* issue is whether the governmental interests are directly advanced by the regulation. The interest in protecting the privacy of residents presents some difficulty for the cities. Privacy is inherently an individual matter; it is difficult to violate a person's privacy unless that person wishes to be let alone. By these ordinances, Idaho Falls and Pocatello seek to make the choice for the resident whether or not to receive uninvited solicitors. *See Martin v. City of Struthers*, 319 U.S. 141 (1943); *compare Rowan v.*

United States Post Office Dep't., 397 U.S. 728, 736-37 (1970). The ordinances thus do not protect privacy when applied to residences whose occupants welcome uninvited solicitors. On the other hand, when the residents wish not to be disturbed, the ordinances directly protect their privacy. Prevention of crime is more problematical; crime might be reduced by prohibiting solicitors from summoning residents to their doors, but there is little in the record to substantiate that view. There is no prohibition against strangers coming to doorsteps to leave handbills; much opportunity for crime consequently is left unaffected. It is even more doubtful that consumer protection is served by the ordinances; there is no showing that door-to-door solicitation has resulted in overreaching, or that consumers are more susceptible to unfair sales pitches when standing in their doors than when they are on the street or in the store. It is therefore the privacy interest, and perhaps marginally the crime-prevention interest, that satisfy the cities' requirements under the third prong of the *Central Hudson* test.

The final question under *Central Hudson* is whether the ordinances are "more extensive than is necessary to serve" the cities' interests. *Central Hudson*, 447 U.S. at 566. It is here that Project 80's' argument is at its strongest. To protect privacy, there is clearly a less restrictive alternative available to the cities.[4] Citizens who desire privacy can post a notice to

[4]Like the Second Circuit, *Fox v. Board of Trustees*, 841 F.2d 1207 (1988), *petition for cert. filed*, we view the fourth prong of the *Central Hudson* test as embodying a requirement of the "least restrictive alternative." *See Actmedia, Inc. v. Stroh*, 830 F.2d 957, 966 (9th Cir. 1986). The Court in *Central Hudson stated:*

> The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.

447 U.S. at 565 (citation omitted). The Third Circuit, however, has held that *Central Hudson* does not require the least restrictive alternative. *American Future Systems v. Penn. State University*, 752 F.2d 854, 865 (3d Cir. 1984). With respect, we disagree.

that effect, or can inform a central registry established by the city. Crime prevention can be served by requiring solicitors to register; Project 80's itself sought to obtain licenses from the cities involved here. "A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers." *Martin v. Struthers*, 319 U.S. 141, 148 (1943). The existence of such alternatives precludes the broad prohibition enacted by Idaho Falls and Pocatello. *See ACORN v. City of Frontenac*, 714 F.2d 813, 819 (8th Cir. 1983); *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1257 (7th Cir. 1985); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1557 (7th Cir. 1986), *aff'd*, 107 S.Ct. 919 (1987).

Nothing in the Supreme Court's most recent decision involving residential privacy, *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), modifies this conclusion. In *Frisby*, the Court rejected a facial challenge to a city ordinance that was construed to ban picketing targeted at an individual residence. Central to the Court's decision was the fact that "[t]he offensive nature of the form of communication banned by the . . . ordinance . . . can scarcely be questioned." *Id.* at __. Thus the very nature of residential picketing made it unwelcome. The court made its rationale clear at the conclusion of its opinion:

> Particular hypothetical applications of the ordinance — to, for example, . . . picketers present at a particular home by invitation of the resident — may present somewhat different questions. . . . [S]ince our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to such hypotheticals remains open to question.
>
> Because the picketing prohibited by the . . . ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has

> a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored.

Id. at ___.

[4] Unlike the ordinance in *Frisby*, the ordinances of Idaho Falls and Pocatello restrict an activity that is not inherently unwelcome. By sweeping far more broadly than necessary to protect privacy, the ordinances fail to satisfy the fourth requirement of *Central Hudson*.

Time, place and manner restrictions

The two cities argue, in various ways, that it is inappropriate to apply the *Central Hudson* test in its full force to their ordinances prohibiting uninvited door-to-door solicitation. It is true that the *Central Hudson* analysis has usually been employed to test the validity of *content* regulation of commercial speech. *Central Hudson* itself dealt with a regulation banning the advertisement of electric power. And in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), the Supreme Court applied the *Central Hudson* standard to a statute prohibiting the advertisement of casino gambling directed to residents of Puerto Rico. The Court upheld the statute, concluding that the state interest in reducing the demand of residents for casino gambling could be served in no less restrictive way.

Idaho Falls and Pocatello contend that the *Central Hudson* analysis, and particularly its fourth prong, is simply inappropriate for determining the validity of a time, place and manner regulation that is not directed at content.[5] Idaho Falls and

[5]Project 80's vigorously disputes the proposition that the ordinances are content-neutral, because of express or implied exceptions for nonprofit solicitors. *see ACORN v. Municipality of Golden*, 744 F.2d 739, 749 (9th Cir. 1984). For purposes of our analysis, however, we will accept the cities' characterization.

Pocatello rely on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in which the Supreme Court upheld a zoning ordinance that prohibited "adult" theaters in residential districts. The Court viewed the ordinance as content-neutral, and held that " 'content-neutral' " time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47; *see also United States v. Albertini*, 472 U.S. 675, 688-89 (1985). Idaho Falls and Pocatello argue that *Renton* dispenses with any requirement that the ordinances employ the least restrictive means of serving the cities' interests.

The Third Circuit, in a case preceding *Renton*, has taken a position similar to that urged by Idaho Falls and Pocatello, holding that a time, place and manner regulation is sufficiently "tailored" if the regulation leaves open "ample alternative channels of communication."[6] *Pennsylvania Alliance for Jobs and Energy v. Council of Munhall*, 743 F.2d 182, 185 (3d Cir. 1984). The Fifth Circuit, applying *Renton*, has held that "narrow tailoring" is an independent requirement in addition to "ample alternative channels," but that it does not necessitate employment of the least restrictive means. *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276 (5th Cir.),

[6]The parties vigorously dispute whether the ordinances, which leave Project 80's free to advertise by other methods or to make telephone appointments, provide "ample alternative channels." Project 80's relies on *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which struck down an ordinance against "For Sale" signs on residential property; the alternatives were held less effective or more costly, *id.* at 93. *See also Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982). Our conclusion that the ordinances are invalid for failure to employ less restrictive alternatives makes it unnecessary for us to address the issue of "ample alternatives." We point out the distinction between the two issues: "ample alternative channels" refers to the alternatives available to the speaker; "less restrictive alternatives" refers to alternatives available to the regulator.

rehearing en banc denied, 841 F.2d 107 (1988), *petition for cert. filed*. The Seventh Circuit, however, has viewed *Renton* as consistent with a host of prior cases that employed some variant of the least restrictive means test. *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1551-1553 (7th Cir. 1986)(citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984); *Members of City Council v. Vincent*, 466 U.S. 789, 808 (1984); *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972)), *aff'd*, 107 S.Ct. 919 (1987). *See also Heffron v. Int'l Society of Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981).

In the most extensive treatment of the subject, the Seventh Circuit held that a time, place and manner restriction on door-to-door solicitation not only must leave open adequate alternative channels of communication, but also must employ the least restrictive means of protecting the public interest. *Watseka*, 796 F.2d at 1552. The judgment of the Seventh Circuit was affirmed without opinion by the Supreme Court. *Watseka*, 107 S.Ct. 919 (1987). Ordinarily, we would end our inquiry there, for summary affirmances by the Supreme Court create precedent that is binding upon us. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

The Fifth Circuit, however, has taken the position that the summary affirmance of *Watseka* does not establish the legitimacy of the least restrictive means test. *SDJ, Inc. v. City of Houston*, 841 F.2d 107 (5th Cir. 1988)(on denial of rehearing en banc), *petition for cert. filed*. The Fifth Circuit was of the view that, in affirming, the Supreme Court had not necessarily decided that issue. With all respect, we disagree with the Fifth Circuit. Three Justices dissented from the summary affirmance on the express and sole ground that the court of appeals should not have imposed a requirement of the least restrictive means upon a time, place and manner regulation. *Watseka*, 108 S.Ct. at 920 (White, Jr., joined by Rehnquist, C.J., and O'Connor, J., dissenting). The jurisdictional state-

ment in *Watseka* presented the Supreme Court with the question whether the ordinance's limitation must merely be reasonable, or "must be the most reasonable limitation." *SDJ, Inc.*, 841 F.2d at 108. Under these circumstances, we conclude that the Supreme Court's affirmance addresses and approves the least restrictive means test imposed by the Seventh Circuit in *Watseka*. In light of the Fifth Circuit's position, however, we add that we would reach the same conclusion in the absence of the Supreme Court's affirmance of *Watseka*.

[5] We agree with the Seventh Circuit that policy and pre-*Watseka* Supreme Court precedent support the imposition of a least restrictive means requirement. *Watseka*, 796 F.2d at 1553 and cases there cited; *see Wisconsin Action Coalition v. Kenosha*, 767 F.2d 1248, 1255 (7th Cir. 1985). The Eighth Circuit reached a similar conclusion in striking down an ordinance restricting door-to-door solicition. *ACORN v. City of Frontenac*, 714 F.2d 813, 818-19 (8th Cir. 1983); *see also New York City Unemployed and Welfare Council v. Brezenoff*, 677 F.2d 232, 237 (2d Cir. 1982). We also agree with the Seventh Circuit's view in *Watseka* that *Renton* did not discard the requirement that content-neutral time, place and manner restrictions employ means no more restrictive than necessary to serve the governmental interest. The Court in *Renton* itself observed that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52. Moreover, in its most recent case dealing with a time, place and manner restriction, the Supreme Court reiterated the requirement that such restrictions be narrowly tailored. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 108 S. Ct. at 2502.

Idaho Falls and Pocatello contend that, even if the least restrictive alternative requirement is appropriate for time, place, and manner restrictions of *non*commercial speech, it is

not an appropriate requirement for commercial speech. We fail to see why. Commercial speech is protected because of the value of its information to the consumer and to the public in our free market economy. *Virginia Board of Pharmacy*, 425 U.S. at 763-65. There is nothing in nature of the information that renders it appropriate for the cities to restrict it unnecessarily. The very existence of the *Central Hudson* test, which arose in a context of commercial speech, suggests otherwise. Moreover, a majority of the Supreme Court applied the least restrictive alternative analysis of *Central Hudson* in testing the validity of a prohibition of off-site commercial billboards, a prohibition that was at least partly a regulation of place and manner. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 508 (1981)(prohibition goes no further than necessary to serve aesthetic and traffic-safety interests).

[6] Even if we assume that the "least restrictive alternative" requirement need not, in all good sense, be employed to the full extent of the superlative "least," the ordinances of Idaho Falls and Pocatello fall far short of any reasonable requirement of necessity. For the same reasons that we found these ordinances deficient under the fourth prong of *Central Hudson*, they fail as appropriate time, place, and manner restrictions. Privacy is easily served by prohibiting solicitation at households that have posted a sign or listed themselves in a registry; crime can be regulated by licensing, registration, and normal enforcement. Consumer protection, an interest the cities have not elaborated upon, can be served by providing for a period of free rescission of sales. By rejecting such reasonable alternatives in favor of a total prohibition on uninvited solicitation, these ordinances violate the First Amendment commercial speech rights of Project 80's.

CONCLUSION

The summary judgments in favor of Idaho Falls and Pocatello are reversed;[7] the case is remanded for further proceed-

[7]Our disposition of this case renders it unnecessary to deal with the question whether the ordinances expressly or in their enforcement discriminate

ings consistent with this opinion.

REVERSED AND REMANDED.

impermissibly between commercial solicitors and nonprofit solicitors. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611, 4615-16 (U.S. June 17, 1988).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PROJECT 80's, INC. AND DAVID JOHN FITZEN, *Plaintiffs-Appellants,* v. CITY OF POCATELLO and THE CITY OF IDAHO FALLS, IDAHO, *Defendants-Appellees.*	No. 86-4348 D.C. No. CV-86-4128 MJC ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, Chief Judge, Presiding

Argued and Submitted
August 4, 1987—Seattle, Washington

Filed September 15, 1988
Amended May 25, 1989

Before: William C. Canby, Jr., Stephen Reinhardt and Robert R. Beezer, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Constitutional Law

The court reversed a summary judgment, holding that two ordinances were unconstitutional.

The cities of Idaho Falls and Pocatello had two ordinances almost identical banning uninvited residential door-to-door solicitation. Appellant Project 80's, Inc. hires teenagers to sell various confectionaries door-to-door. Pocatello and Idaho Falls police issued citations against two soliciting minors employed by Project 80's for violation of the anti-solicitation ordinances. After Project 80's brought an action challenging the constitutionality of the two ordinances, the district court granted summary judgment for the cities/defendants.

[1] In evaluating the four-prong test for commercial speech, the court concluded that door-to-door solicitation by Project 80's included a sufficient element of commercial speech to qualify under the first prong. [2] Under the second prong, the court had little difficulty in accepting privacy, prevention of crime, and consumer protection as substantial state interests. [3] In determining the third prong, whether the governmental interests are directly advanced by the regulation, the court decided that the privacy interest and perhaps, marginally, the crime-prevention interest, satisfied the cities' requirements. [4] However, the cities fail the fourth prong, by sweeping far more broadly than necessary to protect privacy. [5] The court also agreed with the Seventh Circuit that policy Supreme Court case precedent support the imposition of a least restrictive means requirement. [6] Thus, for the same reasons the court found these ordinances deficient under the fourth prong, they fail as appropriate time, place, and manner restrictions.

COUNSEL

F. Michael Burkett, Boise, Idaho, for the plaintiffs/appellants.

Nancy A. Ferris, Pocatello, Idaho, for the defendant/appellee City of Pocatello and Joseph C. Burgess, Idaho Falls, Idaho, for the defendant/appellee City of Idaho Falls.

ORDER

The opinion is hereby amended to include a footnote at the end of the seventh line of the left column, 857 F.2d at 597 after "from the cities involved here." The footnote reads:

> This case is accordingly different from *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), where the Supreme Court upheld a prohibition of advertising of casino gambling. Because the government's interest was "the reduction of demand for casino gambling by the residents of Puerto Rico," *id.* at 341, a ban against only the advertisement of *casino* gambling to *residents* was no broader than necessary to serve that interest. *Id.* at 342-44. The *Posada* opinion also relied in part on the latitude to be given governments in regulating "products or activities deemed harmful" and subject to total prohibition, or lesser restrictions, on that account. *Id.* at 346-347. Nothing on the order of gambling, prostitution, or liquor sale is involved here.

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and of the above amendment. A vote has been taken and a majority of the court has voted not to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggested for rehearing en banc is rejected.

OPINION

CANBY, Circuit Judge:

This action challenges the constitutionality of two ordinances that ban uninvited residential door-to-door solicitation. The district court concluded that the ordinances did not violate appellants' First Amendment right of commercial speech, and it accordingly granted summary judgment for the defendants. We reverse.

FACTS

The two ordinances are almost identical. The Idaho Falls ordinance provides:

> UNINVITED PEDDLERS PROHIBITED: The practice of going in and upon private residences in the Municipality by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise, not having been requested or invited to do so by the owner or occupant of said private premises, for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is hereby prohibited and punishable under the provisions of this Code.

Idaho Falls City Code § 5-4-1. The Pocatello ordinance[1] is to

[1]Pocatello City Ordinance No. 9.24.010 provides:

Uninvited peddlers declared nuisance.

A. The practice of going in and upon private residences in the municipality by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited to do so by the owner or owners, occupant, or occupants of the private residences is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

the same effect, except that it contains a proviso that "persons who solicit donations for charitable or nonprofit organizations shall not be deemed to be in violation" of the ordinance.

Plaintiffs are Project 80's, Inc., and David Fitzen.[2] Project 80's is an Idaho corporation providing work programs for teen-age youths. David Fitzen, who began working for Project 80's as a teen-ager, now coordinates solicitation and sales in an area that includes Pocatello and Idaho Falls. His sales force, all under the age of eighteen, sell various confectionaries door-to-door. They normally sell between the hours of 4:00 and 8:30 p.m. on weekdays and all day on Saturdays. In 1984, Project 80's sought licenses from both Pocatello and Idaho Falls to conduct door-to-door sales. The licenses were denied. Project 80's nevertheless sent its staff into both cities and conducted door-to-door sales. On February 4, 1986, the Pocatello Police Department issued citations against two minors employed by Project 80's for violation of the Pocatello anti-solicitation ordinance. The Pocatello police also cited Fitzen for encouraging the delinquency of a minor. In March 1986, the Idaho Falls Police Department, responding to a complaint, cited Fitzen for violation of the Idaho Falls ordinance.

Project 80's subsequently brought this action challenging the constitutionality of the two ordinances and seeking

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B. Acts prohibited under this section include solicitation of orders for the sale of, or payment for, any goods, wares, merchandise, services, employment or contracting for any of the aforementioned. Requests for goods, gifts, donations or services by the solicitor, salesperson or vendor from the resident is also declared a nuisance; provided, however, persons who solicit donations for charitable or nonprofit organizations shall not be deemed to be in violation of this chapter.

[2]Unless otherwise indicated, references to "Project 80's" in this opinion include Fitzen.

declaratory and injunctive relief against their enforcement.[3] The district court granted summary judgment for the defendants.

DISCUSSION

Project 80's claim lies rather neatly at the intersection of two developing lines of First Amendment law. One has to do with the evolving standards for protection of commercial speech; the other with the permissible extent of time, place, and manner restrictions on door-to-door solicitation. We will discuss each in turn.

Commercial speech

In *Breard v. Alexandria*, 341 U.S. 622 (1951), the Supreme Court upheld an ordinance against door-to-door solicitation, and observed that a First Amendment challenge to such an ordinance was "not open to the solicitors for gadgets or brushes." *Id.* at 641. *Breard*, however, was decided at a time when commercial advertising was thought to be wholly unprotected by the First Amendment. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942).

Subsequently, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Supreme Court held that the First Amendment protected purely commercial advertisements of prescription drug prices. The information conveyed by such advertising was viewed as highly important and beneficial to the consumer and to society. *Id.* at 763-65. Commercial advertising has

[3]The record before us does not disclose what final disposition was made of the citations issued by the two cities. We do not read Project 80's' complaint as seeking relief from those citations; it prays for relief against "further" enforcement. Accordingly, abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is not an issue. *Wooley v. Maynard*, 430 U.S. 705 (1977). Neither city has suggested abstention in the district court or this court.

since been protected in a number of contexts. *E.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988). Despite the value and importance of commercial speech, it was understood from the beginning that it was entitled to a lower degree of First Amendment protection than noncommercial speech. Commercial speech, for example, could be prohibited if it was misleading or deceptive, *see Virginia Board of Pharmacy*, 425 U.S. at 771-72, or if it advertised a transaction or activity that was itself illegal, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Whether further regulation was permitted was not clear at first, but the Supreme Court later announced a standard in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). In striking down a state prohibition on the advertising of electric power, the Court adopted a four-part test for regulation of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The parties disagree on whether the application of this test must result in the invalidation of the Idaho Falls and Pocatello ordinances. They further disagree on the question whether this *Central Hudson* standard itself applies with full force to ordinances prohibiting door-to-door solicitation — an area normally governed by a somewhat divergent test for

time, place and manner regulation of noncommercial speech. We address these questions in order.

The first issue under the four-prong *Central Hudson* analysis is whether Project 80's sales activities constitute expression protected by the First Amendment. There is no dispute that the sale of candies and similar items is generally lawful, and there is no claim that Project 80's' sales pitch is misleading or deceptive. Pocatello suggests, however, that the activity of Project 80's in consummating sales door-to-door is primarily conduct, and that the speech element is so subordinated that the First Amendment may not be implicated at all. Pocatello points out that most of the decisions protecting commercial speech, like *Virginia Board of Pharmacy*, involve advertising, not actual sales. The ordinances in question here do not forbid Project 80's from leaving printed advertisements on the homeowner's doorstep; they merely prohibit in-person solicitation. Pocatello relies upon *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), in which the Supreme Court upheld a prohibition of in-person solicitation of clients by lawyers, stating that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." *Id.* at 459.

[1] Pocatello's argument goes too far, however, in suggesting that the sales activities of Project 80's do not implicate the First Amendment at all. The decision in *Ohralik* was primarily based on the potential for overreaching by an attorney who importunes a potential client, not on the fact that solicitation was devoid of information. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985). There can be little question that the door-to-door sales of Project 80's involve a considerable degree of commercial communication by the sales force. As the Supreme Court noted in a case involving noncommerical door-to-door fundraising, "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes. . . ." *Village of Schaumburg v. Citizens for a Better Environment*,

444 U.S. 620, 632 (1980); *see Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-18 (1976). We conclude, therefore, that the door-to-door solicitation of Project 80's includes a sufficient element of commercial speech to qualify under the first prong of the *Central Hudson* standard. The speech component of that solicitation does not disappear merely because it is connected with a sale or attempted sale. Nor does it vanish simply because an alternative of printed communication may exist. Alternatives may enter the analysis under other prongs of the *Central Hudson* analysis, *see, e.g., American Future Systems v. Penn. State University*, 752 F.2d 854, 866 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985), but they do not remove in-person solicitation from the First Amendment altogether.

[2] The next issue under *Central Hudson* is whether the governmental interest is substantial. Idaho Falls asserts a governmental interest in protecting the privacy and repose of its citizens in their homes. To this Pocatello adds the interests of consumer protection, regulation of commercial transactions, and prevention of crime. "Regulation of commercial transactions" is more of a practice than an interest; we would have to be told the purpose of the regulation to determine whether an important governmental interest was involved. We have little difficulty, however, in accepting privacy, prevention of crime, and consumer protection as substantial state interests. *See Frisby v. Schultz*, 56 U.S.L.W. __ __ (U.S. June 27, 1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980).

[3] The third *Central Hudson* issue is whether the governmental interests are directly advanced by the regulation. The interest in protecting the privacy of residents presents some difficulty for the cities. Privacy is inherently an individual matter; it is difficult to violate a person's privacy unless that person wishes to be let alone. By these ordinances, Idaho Falls and Pocatello seek to make the choice for the resident whether or not to receive uninvited solicitors. *See Martin v. City of Struthers*, 319 U.S. 141 (1943); *compare Rowan v.*

United States Post Office Dep't., 397 U.S. 728, 736-37 (1970). The ordinances thus do not protect privacy when applied to residences whose occupants welcome uninvited solicitors. On the other hand, when the residents wish not to be disturbed, the ordinances directly protect their privacy. Prevention of crime is more problematical; crime might be reduced by prohibiting solicitors from summoning residents to their doors, but there is little in the record to substantiate that view. There is no prohibition against strangers coming to doorsteps to leave handbills; much opportunity for crime consequently is left unaffected. It is even more doubtful that consumer protection is served by the ordinances; there is no showing that door-to-door solicitation has resulted in overreaching, or that consumers are more susceptible to unfair sales pitches when standing in their doors than when they are on the street or in the store. It is therefore the privacy interest, and perhaps marginally the crime-prevention interest, that satisfy the cities' requirements under the third prong of the *Central Hudson* test.

The final question under *Central Hudson* is whether the ordinances are "more extensive than is necessary to serve" the cities' interests. *Central Hudson*, 447 U.S. at 566. It is here that Project 80's' argument is at its strongest. To protect privacy, there is clearly a less restrictive alternative available to the cities.[4] Citizens who desire privacy can post a notice to

[4]Like the Second Circuit, *Fox v. Board of Trustees*, 841 F.2d 1207 (1988), *petition for cert. filed*, we view the fourth prong of the *Central Hudson* test as embodying a requirement of the "least restrictive alternative." *See Actmedia, Inc. v. Stroh*, 830 F.2d 957, 966 (9th Cir. 1986). The Court in *Central Hudson stated:*

> The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.

447 U.S. at 565 (citation omitted). The Third Circuit, however, has held that *Central Hudson* does not require the least restrictive alternative. *American Future Systems v. Penn. State University*, 752 F.2d 854, 865 (3d Cir. 1984). With respect, we disagree.

that effect, or can inform a central registry established by the city. Crime prevention can be served by requiring solicitors to register; Project 80's itself sought to obtain licenses from the cities involved here.[5] "A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers." *Martin v. Struthers*, 319 U.S. 141, 148 (1943). The existence of such alternatives precludes the broad prohibition enacted by Idaho Falls and Pocatello. *See ACORN v. City of Frontenac*, 714 F.2d 813, 819 (8th Cir. 1983); *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1257 (7th Cir. 1985); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1557 (7th Cir. 1986), *aff'd*, 107 S.Ct. 919 (1987).

Nothing in the Supreme Court's most recent decision involving residential privacy, *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), modifies this conclusion. In *Frisby*, the Court rejected a facial challenge to a city ordinance that was construed to ban picketing targeted at an individual residence. Central to the Court's decision was the fact that "[t]he offensive nature of the form of communication banned by the . . . ordinance . . . can scarcely be questioned." *Id.* at __. Thus the very nature of residential picketing made it unwelcome. The court made its rationale clear at the conclusion of its opinion:

> Particular hypothetical applications of the ordi-

[5]This case is accordingly different from *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), where the Supreme Court upheld a prohibition of advertising of casino gambling. Because the government's interest was "the reduction of demand for casino gambling by the residents of Puerto Rico," *id.* at 341, a ban against only the advertisement of *casino* gambling to *residents* was no broader than necessary to serve that interest. *Id.* at 342-44. The *Posada* opinion also relied in part on the latitude to be given governments in regulating "products or activities deemed harmful" and subject to total prohibition, or lesser restrictions, on that account. *Id.* at 346-347. Nothing on the order of gambling, prostitution, or liquor sale is involved here.

> nance — to, for example, . . . picketers present at a particular home by invitation of the resident — may present somewhat different questions. . . . [S]ince our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to such hypotheticals remains open to question.
>
> Because the picketing prohibited by the . . . ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored.

Id. at __.

[4] Unlike the ordinance in *Frisby*, the ordinances of Idaho Falls and Pocatello restrict an activity that is not inherently unwelcome. By sweeping far more broadly than necessary to protect privacy, the ordinances fail to satisfy the fourth requirement of *Central Hudson*.

Time, place and manner restrictions

The two cities argue, in various ways, that it is inappropriate to apply the *Central Hudson* test in its full force to their ordinances prohibiting uninvited door-to-door solicitation. It is true that the *Central Hudson* analysis has usually been employed to test the validity of *content* regulation of commercial speech. *Central Hudson* itself dealt with a regulation banning the advertisement of electric power. And in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), the Supreme Court applied the *Central Hudson* standard to a statute prohibiting the advertisement of casino gambling directed to residents of Puerto Rico. The Court upheld the statute, concluding that the state interest in reducing the

demand of residents for casino gambling could be served in no less restrictive way.

Idaho Falls and Pocatello contend that the *Central Hudson* analysis, and particularly its fourth prong, is simply inappropriate for determining the validity of a time, place and manner regulation that is not directed at content.[6] Idaho Falls and Pocatello rely on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in which the Supreme Court upheld a zoning ordinance that prohibited "adult" theaters in residential districts. The Court viewed the ordinance as content-neutral, and held that " 'content-neutral' " time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47; *see also United States v. Albertini*, 472 U.S. 675, 688-89 (1985). Idaho Falls and Pocatello argue that *Renton* dispenses with any requirement that the ordinances employ the least restrictive means of serving the cities' interests.

The Third Circuit, in a case preceding *Renton*, has taken a position similar to that urged by Idaho Falls and Pocatello, holding that a time, place and manner regulation is sufficiently "tailored" if the regulation leaves open "ample alternative channels of communication."[7] *Pennsylvania Alliance*

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[6]Project 80's vigorously disputes the proposition that the ordinances are content-neutral, because of express or implied exceptions for nonprofit solicitors, *see ACORN v. Municipality of Golden*, 744 F.2d 739, 749 (9th Cir. 1984). For purposes of our analysis, however, we will accept the cities' characterization.

[7]The parties vigorously dispute whether the ordinances, which leave Project 80's free to advertise by other methods or to make telephone appointments, provide "ample alternative channels." Project 80's relies on *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which struck down an ordinance against "For Sale" signs on residential property; the alternatives were held less effective or more costly, *id.* at 93. *See also Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1142 (3d

for Jobs and Energy v. Council of Munhall, 743 F.2d 182, 185 (3d Cir. 1984). The Fifth Circuit, applying *Renton*, has held that "narrow tailoring" is an independent requirement in addition to "ample alternative channels," but that it does not necessitate employment of the least restrictive means. *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276 (5th Cir.), *rehearing en banc denied*, 841 F.2d 107 (1988), *petition for cert. filed*. The Seventh Circuit, however, has viewed *Renton* as consistent with a host of prior cases that employed some variant of the least restrictive means test. *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1551-1553 (7th Cir. 1986)(citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984); *Members of City Council v. Vincent*, 466 U.S. 789, 808 (1984); *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972)), *aff'd*, 107 S.Ct. 919 (1987). *See also Heffron v. Int'l Society of Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981).

In the most extensive treatment of the subject, the Seventh Circuit held that a time, place and manner restriction on door-to-door solicitation not only must leave open adequate alternative channels of communication, but also must employ the least restrictive means of protecting the public interest. *Watseka*, 796 F.2d at 1552. The judgment of the Seventh Circuit was affirmed without opinion by the Supreme Court. *Watseka*, 107 S.Ct. 919 (1987). Ordinarily, we would end our inquiry there, for summary affirmances by the Supreme Court create precedent that is binding upon us. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

Cir.), *cert. denied*, 456 U.S. 975 (1982). Our conclusion that the ordinances are invalid for failure to employ less restrictive alternatives makes it unnecessary for us to address the issue of "ample alternatives." We point out the distinction between the two issues: "ample alternative channels" refers to the alternatives available to the speaker; "less restrictive alternatives" refers to alternatives available to the regulator.

The Fifth Circuit, however, has taken the position that the summary affirmance of *Watseka* does not establish the legitimacy of the least restrictive means test. *SDJ, Inc. v. City of Houston,* 841 F.2d 107 (5th Cir. 1988)(on denial of rehearing en banc), *petition for cert. filed.* The Fifth Circuit was of the view that, in affirming, the Supreme Court had not necessarily decided that issue. With all respect, we disagree with the Fifth Circuit. Three Justices dissented from the summary affirmance on the express and sole ground that the court of appeals should not have imposed a requirement of the least restrictive means upon a time, place and manner regulation. *Watseka,* 108 S.Ct. at 920 (White, Jr., joined by Rehnquist, C.J., and O'Connor, J., dissenting). The jurisdictional statement in *Watseka* presented the Supreme Court with the question whether the ordinance's limitation must merely be reasonable, or "must be the most reasonable limitation." *SDJ, Inc.,* 841 F.2d at 108. Under these circumstances, we conclude that the Supreme Court's affirmance addresses and approves the least restrictive means test imposed by the Seventh Circuit in *Watseka.* In light of the Fifth Circuit's position, however, we add that we would reach the same conclusion in the absence of the Supreme Court's affirmance of *Watseka.*

[5] We agree with the Seventh Circuit that policy and pre-*Watseka* Supreme Court precedent support the imposition of a least restrictive means requirement. *Watseka,* 796 F.2d at 1553 and cases there cited; *see Wisconsin Action Coalition v. Kenosha,* 767 F.2d 1248, 1255 (7th Cir. 1985). The Eighth Circuit reached a similar conclusion in striking down an ordinance restricting door-to-door solicition. *ACORN v. City of Frontenac,* 714 F.2d 813, 818-19 (8th Cir. 1983); *see also New York City Unemployed and Welfare Council v. Brezenoff,* 677 F.2d 232, 237 (2d Cir. 1982). We also agree with the Seventh Circuit's view in *Watseka* that *Renton* did not discard the requirement that content-neutral time, place and manner restrictions employ means no more restrictive than necessary to serve the governmental interest. The Court in *Renton* itself

observed that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52. Moreover, in its most recent case dealing with a time, place and manner restriction, the Supreme Court reiterated the requirement that such restrictions be narrowly tailored. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 108 S. Ct. at 2502.

Idaho Falls and Pocatello contend that, even if the least restrictive alternative requirement is appropriate for time, place, and manner restrictions of *non*commercial speech, it is not an appropriate requirement for commercial speech. We fail to see why. Commercial speech is protected because of the value of its information to the consumer and to the public in our free market economy. *Virginia Board of Pharmacy*, 425 U.S. at 763-65. There is nothing in nature of the information that renders it appropriate for the cities to restrict it unnecessarily. The very existence of the *Central Hudson* test, which arose in a context of commercial speech, suggests otherwise. Moreover, a majority of the Supreme Court applied the least restrictive alternative analysis of *Central Hudson* in testing the validity of a prohibition of off-site commercial billboards, a prohibition that was at least partly a regulation of place and manner. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 508 (1981)(prohibition goes no further than necessary to serve aesthetic and traffic-safety interests).

[6] Even if we assume that the "least restrictive alternative" requirement need not, in all good sense, be employed to the full extent of the superlative "least," the ordinances of Idaho Falls and Pocatello fall far short of any reasonable requirement of necessity. For the same reasons that we found these ordinances deficient under the fourth prong of *Central Hudson*, they fail as appropriate time, place, and manner restrictions. Privacy is easily served by prohibiting solicitation at households that have posted a sign or listed themselves in a

registry; crime can be regulated by licensing, registration, and normal enforcement. Consumer protection, an interest the cities have not elaborated upon, can be served by providing for a period of free rescission of sales. By rejecting such reasonable alternatives in favor of a total prohibition on uninvited solicitation, these ordinances violate the First Amendment commercial speech rights of Project 80's.

CONCLUSION

The summary judgments in favor of Idaho Falls and Pocatello are reversed;[8] the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

[8]Our disposition of this case renders it unnecessary to deal with the question whether the ordinances expressly or in their enforcement discriminate impermissibly between commercial solicitors and nonprofit solicitors. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611, 4615-16 (U.S. June 17, 1988).

Supreme Court, U
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No. 89-647

IN THE
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OCTOBER TERM, 1989

CITY OF IDAHO FALLS, IDAHO,
Petitioner,

v.

PROJECT 80's, INC. and
DAVID JOHN FITZEN,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

Petitioner argues that certiorari should be granted in this case because the 9th Circuit adopted and applied the least restrictive means test to determine whether the Citys' ordinances measure up to the First Amendment protection of commercial speech.

This Court's grant of certiorari, however, should turn on the broadest basis relied upon by the 9th Circuit to support its decision. Although the 9th Circuit Court did discuss its support of the least restrictive means test, that is not the only basis for its decision. The 9th Circuit Court's ruling is well supported by rationale cited in the Court's opinion that does not rely upon the least restrictive means test.

This is exemplified in the very means the lower Court used to express its support for the least restrictive test. That notation is contained in a footnote, not in the body of the Court's opinion. The remainder of the lower Court's opinion makes it clear that it is not applying the
test to the full extent of the superlative "least" but rather requiring that reasonable alternative channels of communication be left open. The Court cited several alternatives that were not as restrictive as a total ban. These included posting a notice or sign, establishing a central registry, requiring licensing, imposing criminal violations on those who ignore a posted sign, and using identification devices for solicitors. The Court then stated "The existence of such alternatives precludes the broad prohibition enacted by Idaho Falls and Pocatello." *Project 80's, Inc. V. City of Pocatello,* No. 86-4348, slip. op. at 5592-93 (9th Cir. May 25, 1989).

The 9th Circuit recognized that the ordinances in question, which are total bans, are far broader than necessary. They prohibit free speech much more substantially than the *least* restrictive alternative. It is the breadth of these total prohibitions that the Circuit Court found unreasonable, when it stated: "By sweeping far more broadly than necessary to protect privacy, the ordinances fail to satisfy the fourth requirement of *Central Hudson*." *Id*., at 5594.

In their request for certiorari, Petitioner indicates that an issue to be decided by this case is whether the least restrictive means test should have been applied or not. That issue was already visited by this Court in the *Board of Trustees of the State University of New York v. Fox*, No. 87-2012, slip op. (U.S. June 29, 1989), 109 S.Ct. 3028, 106 L.Ed. 388. The *Fox* decision is the law at this point there is no need to revisit the issue of appropriateness of applying the least restrictive means test. Instead, this Court should recognize that the 9th Circuit's decision is based on a determination that the ordinances in question are far short of those which can reasonably be imposed to accomplish the City's desired objectives.

The 9th Circuit Court expressed this at page 5598:

> Even if we assume that the "least restrictive alternative" re quirement need not, in all good sense, be employed to the full extent of the superlative "least" the ordinances of

> Idaho Falls and Pocatello fall far short of any reasonable re quirement of necessity. . . .

Then after again restating the several and varied alternatives available to the city, the Court stated:

> By rejecting such reasonable alternatives in favor of a total prohibition on uninvited solicitation, these ordinances violate the First Amendment commercial speech rights of Project 80's.

Project 80's, Inc. v. City of Pocatello, supra at 5599.

This Court does not need to grant certiorari to reconsider the *Fox* decision that a "reasonable fit" test is appropriate for protection of commercial free speech. Especially since the 9th Circuit decision here does not stand on a least restrictive means test, but rather upon its decision that the absolute prohibitions contained in these two ordinances are not even "reasonable," since several means exist to accomplish the goals of the City without imposing an absolute prohibition of all door-to-door sales activities.

As discussed in the *Fox* decision, "almost all of the restrictions disallowed under *Central Hudson's* fourth prong having been substantially excessive." *Board of Trustees v. Fox, supra,* 109 S.Ct. 3028, 3034. The 9th Circuit Court in its opinion recognized that the restrictions imposed by the City of Idaho Falls and Pocatello are substantially excessive. They are not close to any reasonable restriction and thus were determined by the 9th Circuit to violate the First Amendment's protection of commercial speech.

Of course, the 9th Circuit did not have the benefit of the *Fox* decision in formulating its opinion in the Project 80's case. However, if it had it is clear that its decision is in the line with Fox. In formulating the "reasonable fit" test, the Fox Court characterized it as "something short of the least restrictive means standard." Board of Trustees v. Fox, supra, 109 S.Ct. 3028, 3033. The 9th Circuit has found the ordinances of these two cities to be much more than a "little short" of the least restrictive means; it found them to be "far short of any reasonable requirement of necessity" (*Project 80's, Inc. v. City of Pocatello, supra* at 5598) and that they swept "far more

broadly than necessary to protect privacy." *Id*. at 5594. The 9th Circuit decision stands without reliance on the least restrictive means test. These two ordinances are too broad since they ignore a multitude of reasonable alternatives and thus offend the commercial speech protection provided by the First Amendment as has been designed by this Court in *Central Hudson* and *Fox*.

SUMMARY

There are no issues presented by Petitioner's application for certiorari which need be decided by the Supreme Court of the United States of America. Existing decisions of this Court appropriately address the standards to be used in applying First Amendment protection to commercial speech. The 9th Circuit has found the ordinances in question are far excessive of any reasonable means to accomplish the Citys' goals of protecting privacy. For these reasons, the Petitioner's application for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 4 day of December, 1989 .

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AFFIDAVIT OF SERVICE

MIKE BURKETT, being first duly sworn upon oath, deposes and says:

Pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of respondents Project 80's, Inc.'s and David John Fitzen's Brief of Respondents on each party required to be served, including the following:

Mr. Dale W. Storer
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by depositing the same in the United States mail, first-class mail, postage prepaid on the 4 day of December, 1989.

DATED this 4 day of December, 1989.

Mike Burkett